A

GOVERNMENT OF THE STATE OF SARAWAK & ANOR v. CHONG CHIENG JEN

COURT OF APPEAL, PUTRAJAYA
DAVID WONG DAK WAH JCA
ABDUL RAHMAN SEBLI JCA
B ZAMANI A RAHIM JCA
[CIVIL APPEAL NO: Q-01-210-06-2014]
7 APRIL 2016
[2016] CLJ JT(7)

C ***TORT:*** *Defamation – Allegation of mismanagement of State's financial affairs – Suit by State Government and State Financial Authority – Whether parties lacked locus to maintain action for defamation – Whether common law principle propounded in Derbyshire County Council v. Times Newspapers Ltd (Derbyshire principle) applicable – Whether proceedings by or against Government regulated by*
D *statute – Whether s. 3 Government Proceedings Act 1956 allows Government to sue for defamation by way of civil action – Whether a statutory right – Whether Derbyshire principle consistent with art. 10(1) Federal Constitution – Civil Law Act 1956, s. 3(1) – Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd*

E ***CIVIL PROCEDURE:*** *Action – Government proceedings – Defamation – Allegation of mismanagement of State's financial affairs – Suit by State Government and State Financial Authority – Whether parties lacked locus to maintain action for defamation – Whether common law principle propounded in Derbyshire County Council v. Times Newspapers Ltd (Derbyshire principle) applicable – Whether proceedings by or against Government regulated by statute – Whether s. 3*
F *Government Proceedings Act 1956 allows Government to sue for defamation by way of civil action – Whether a statutory right – Whether Derbyshire principle consistent with art. 10(1) Federal Constitution – Civil Law Act 1956, s. 3(1) – Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*

G ***WORDS & PHRASES:*** *'other provision' – Civil Law Act 1956, s. 3(1) – Defamation suit filed by State Government and State Financial Authority – Whether parties lacked locus to maintain action for defamation – Whether s. 3 Government Proceedings Act 1956 (GPA) is one such 'other provision' which does not prohibit or exclude the Government from suing for defamation – Whether principle in Derbyshire County Council v. Times Newspapers Ltd applicable –*
H *Whether common law of England overrode s. 3 of GPA – Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*

This was an appeal by the appellants/plaintiffs, *ie*, the Government of the State of Sarawak ('the first appellant') and the State Financial Authority ('the second appellant'), against the ruling of the High Court Judge ('HCJ') I dismissing the appellants' claim for defamation against the respondent/defendant on the ground that the appellants did not have a cause of action in defamation. The respondent was a Member of Parliament and the Sarawak

State Assembly. He was also the then Vice Chairman of the Democratic Action Party ('DAP'). It was submitted that the respondent's defamatory statement related to the mismanagement of the State's financial affairs where he alleged that RM11 billion of public fund had disappeared into a 'black hole' and these uncomplimentary utterances against the State Government were published in the Sin Chew Daily News, the DAP's leaflets both in Chinese and English and in an online news portal, Malaysiakini. Prior to the trial of the suit, the respondent filed an application under O. 14A of the Rules of Court 2012 ('ROC') for the following questions to be adjudicated, *ie*, (i) whether the first appellant and/or the second appellant had the right to sue and maintain an action for damages for defamation against the respondent ('question 1'); (ii) whether the actual or precise words complained of and alleged to be defamatory of the appellants and/or the actual original words alleged to be defamatory of the appellants in the alleged DAP leaflet and/or in Sin Chiew Daily News must be specially pleaded or set out in the amended statement of claim ('question 2'); (iii) whether the words complained of and set out in the amended statement of claim derived from the alleged article in Malaysiakini were capable of bearing any defamatory meaning, and/or capable of being understood to refer to the appellants as a matter of law ('question 3'); and (iv) in an action for libel, whether it was permissible in law to group together several articles from different publications in the amended statement of claim without spelling out separately and distinctly what was the precise and pleaded defamatory meaning(s) or imputation(s) that each article was capable of conveying against the person defamed ('question 4'). The respondent submitted that the principle in *Derbyshire County Council v. Times Newspapers Ltd* ('*Derbyshire*') applied in the present case as the common law in England applied to defamation law in Malaysia by virtue of s. 3 of the Civil Law Act 1956 but subject to modification by the Defamation Act 1957. It was further argued that to allow the appellants' claim against the respondent simply for criticising them in mismanaging public funds would go against art. 10(1)(a) of the Federal Constitution which guarantees freedom of speech and expression. On the other hand, the appellants submitted that the *Derbyshire* principle had no application in Malaysia since: (a) proceedings by or against the Government were not bound by common law rules but were regulated by statute, *ie*, s. 3 of the Government Proceedings Act 1956 ('the GPA'); and (b) s. 3 of the GPA did not exclude proceedings in libel or defamation by or against the Government. The HCJ had determined the statement to be defamatory of the appellants but proceeded, however, to dismiss the appellants' claim by holding that although the State Government or a statutory body could sue or be sued, that right did not extend to the right to sue for defamation. In the circumstances, the HCJ answered questions 2, 3 and 4 in favour of the appellants, except for question 1. In support of the decision, the HCJ relied on the principle laid down by the House of Lords in *Derbyshire* where it was decided, *inter alia*, that (a) under common law, a

Local Authority did not have the right to maintain an action for damages in defamation as it would be contrary to the public interest for the organs of Government, whether central or local, to have that right; and (b) it was of the highest public importance that a governmental body should be open to uninhibited public criticism, and a right to sue for defamation would place an undesirable fetter on freedom of speech. Aggrieved, the appellants appealed to this court. Among the issues that arose for consideration were (i) whether s. 3 of the GPA conferred legal rights to the Government to sue for defamation or libel as such claims could be made between private citizens; and (ii) whether the common law principle in *Derbyshire* applied in this case.

Held (allowing appeal with no order as to costs)
Per Abdul Rahman Sebli JCA (for the majority):

(1) The decision in *Derbyshire* was based on the common law which emphasised on public interest and the freedom of expression to criticise the Government and its organs, in that case the local Government. The decision was made against the backdrop of a developed democracy whose social fabric and geopolitics were very different from ours. The Government Proceedings Act 1956, however, was a special statute specially promulgated by Parliament to give the Federal and State Governments the right to commence civil proceedings against any person. Section 3 gives the Government the same right as a private individual to enforce a claim against another private individual by way of a civil action. It is a statutory right and not a common law right. (paras 55, 56 & 66)

(2) The term 'civil proceedings' used in s. 3 of the GPA is defined in s. 2(2) to mean 'any proceeding whatsoever of a civil nature before a court' and the operative words in s. 3 are 'which would, if such claim had arisen between subject and subject, afford ground for civil proceedings'. This meant that if a claim affords ground for civil proceedings between private individuals, it would afford ground for civil proceedings between the Government and private individuals. The word 'whatsoever' within the meaning of s. 2(2) is a word of wide import and is a derivative of the word 'whatever'. There is nothing in the GPA, in particular s. 3 that could be construed as to prohibit the Government from proceeding with an action in defamation. Anything that is said about the Government that has a tendency to lower its reputation in the estimation of right thinking members of the public, or to expose it to hatred, contempt or ridicule, would give rise to a cause of action in defamation. It is the same test that is applicable in a claim for defamation between private individuals. (paras 67, 69, 73, 74 & 77)

(3) A defamatory attack on the Government, especially by members of a rival political party would be taken as an attack on the political party or parties behind the Government. This applies across the board to any political entity that forms the Government of the day and to those who defame it. Further, to allow absolute and unfettered freedom to defame the Government (as opposed to fair comment or criticism) all in the name of freedom of speech and expression was to allow lawlessness to prevail. Making unrestrained defamatory statements against the Government by using freedom of speech and expression as the mantra was a dangerous political manoeuvring that could trigger a chain of negative and even violent political reactions that could spiral out of control. (paras 87-89)

(4) Being an elected representative of the people did not give the respondent the right to defame the Government with impunity. A line had to be drawn between criticism that was made in good faith and for the greater good of the people and a statement that it was unfounded and made recklessly with the sole intention of gaining political mileage by inciting hatred towards the Government. Further, the statutory right of the State Government to sue for defamation was independent of the right of any member of the administration, including the Chief Minister to sue in his own name and in his personal capacity. (paras 91 & 100)

(5) Where a provision had been made by statute, the door to the reception of the common law after the dates specified in paras. (a), (b) and (c) of sub-s. 3(1) of the Civil Law Act 1956 is closed. After these dates, the development of the common law in Malaysia was entirely in the hands of the courts of this country. Further, there was no provision in the UK Crown Proceedings Act 1947 which was in *pari materia* with s. 3 of the GPA. It would be wrong to apply the common law as expounded in *Derbyshire* randomly without regard to the applicable statutory provision, in this case s. 3 of the GPA. The *Derbyshire* principle must be considered from this perspective (*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*; refd). (paras 107, 108, 114 & 116)

(6) The statutory right given to the Government by s. 3 of the GPA to sue for defamation could not be taken away by the application of the common law principle propounded in *Derbyshire* or for that matter, any other common law positions in other common law jurisdictions. Further and in any event, s. 3(1) of the Civil Law Act 1956 expressly excludes the application of the common law where 'other provision has been made or may hereafter be made by any written law in force in Malaysia'. Section 3 of the GPA is one such 'other provision' which does not prohibit or exclude the Government from suing for defamation. The common law could not override this statutory provision. (paras 120 & 121)

(7) Accordingly, the common law as applicable to defamation action by the Government or governmental body had no application in Sarawak by reason of s. 3(1)(c) of the Civil Law Act 1956 and by reason of s. 3 of the GPA, which confers on the State Government the same right as a private citizen to sue another private citizen for defamation by way of civil action. In any event, the issue of whether the impugned statement was defamatory or otherwise must be put to rest since the HCJ had determined the statement to be defamatory of the appellants and the respondent accepted it by not filing any appeal against the determination. (paras 79 & 122)

(8) It would not be proper to remit the case back to the High Court for trial as that would defeat the whole purpose behind the O. 14A procedure, which is to save the expense and delay which would otherwise arise if the action were to proceed to full trial. When the HCJ dismissed the appellants' claim in its entirety after determining question 1 in favour of the respondent and questions 2, 3, and 4 in favour of the appellants, Her Ladyship had in fact finally determined the entire cause of the matter pursuant to O. 14A r. 1(2) of the ROC. If question 1 had been answered in favour of the appellants, along with questions 2, 3 and 4, the final judgment would have been entered against the respondent. Considering that a decision under O. 14A is a final decision in that it finally determines the rights of the parties and therefore appealable to this court and potentially to the Federal Court with leave, any further appeal upon further determination under O. 14A would further delay the final disposal of the case. (paras 127, 129 & 131)

(9) A litigant who moves the court under O. 14A of the ROC must not pose the questions out of curiosity just to see what the court's views would be on the points of law that he was posing for determination. That would be an abuse of process. Once the questions are cast in stone and determined by the court, he was bound by the decision in the same way that the opposing party is bound by the decision, either for the entire claim to be dismissed or for final judgment to be entered. The matter must end there. Since all the four questions had been answered in favour of the appellants, the claim against the respondent had been established without any further need to hear evidence from the respondent nor for further arguments to be canvassed before the HCJ. In the circumstances, judgment was entered against the respondent in terms of prayers (1) and (2) of the amended statement of claim and damages was to be assessed by the Deputy Registrar of the High Court. (paras 132, 134 & 135)

Per David Wong Dak Wah JCA (dissenting):

(1) Section 3 of the GPA is a general piece of legislation to cloth the Government with the legal status to sue or to be sued, and nothing more or nothing less. It only gives the Government the statutory right to

mount any legal action in any civil proceedings which are available to and among private citizens of the country. However, that did not answer the question as to whether the Government possess a cause of action in an action for defamation. That answer could only be found in the law of defamation which was independent of s. 3 of the GPA. (para 17)

(2) Section 3(1)(c) of the Civil Law Act 1956 is no impediment to our courts if and when they deem it fit to develop our common law. To ensure that art. 10 of the Federal Constitution is given its due importance, a common sense approach must be adopted and that is simply to start on a premise that constitutional rights of citizens must be jealously guarded in view of the fact that they are basic and fundamental in nature. These rights are also subject to a presumption in law that Parliament will not invade the same unless clear words are employed in Acts of Parliament. Nowhere in any Act of Parliament is there a specific provision allowing the Government to maintain an action for defamation to stifle this constitutional right of freedom of speech of citizens of the country. The significance of the absence of such a provision could not be underestimated. (paras 20, 23 & 27)

(3) There was no reason as to why this court should not adopt the *Derbyshire* principle in our defamation law as it would be consistent not only with art. 10 of the Federal Constitution but to all the hallmarks of a modern democracy. Those hallmarks, among others, relate to the need for accountability, the need for transparency, the need for freedom of expression and the need for a healthy and responsible fourth estate. The Government continues to possess the right to take a criminal defamation action against whoever uttered defamatory words. As the Government is a public body, it was only appropriate that criminal proceedings through the Attorney General Chambers are used to combat malicious defamatory utterances against the Government of the day. (para 29)

(4) Both the appellants were elected bodies. Governments of the day are made up of the members of the winning political party and their reputation or popularity fluctuates due to numerous and varied reasons. It could not be disputed that a Government of the day may be so popular due to an implementation of a particular policy that no amount of defamatory utterances could put a dent on its reputation or popularity. In any event, the Government of the day could always rebut whatever that was said of it in the public domain. In the present case, it was not necessary for the learned judge to deliberate and decide on the other three issues posed once it was decided that the appellants lacked *locus* to maintain an action for defamation. (paras 9, 41 & 43)

Bahasa Malaysia *Headnotes*

Perayu-perayu/plaintif-plaintif, iaitu, Kerajaan Negeri Sarawak ('perayu pertama') dan Pihak Berkuasa Kewangan Negeri ('perayu kedua') memfailkan rayuan terhadap keputusan Hakim Mahkamah Tinggi ('HMT') yang menolak tuntutan perayu-perayu terhadap responden/defendan berasaskan fitnah atas alasan bahawa perayu-perayu tidak mempunyai kausa tindakan dalam tindakan fitnah. Responden adalah Ahli Parlimen dan Ahli Dewan Undangan Negeri Sarawak. Beliau juga merupakan Naib Pengerusi Democratic Action Party ('DAP'). Dihujahkan bahawa kenyataan fitnah responden berhubung salah urus hal ehwal kewangan negeri di mana beliau mendakwa bahawa RM11 bilion dana awam hilang dalam satu 'lubang hitam' dan perkataan-perkataan tersebut terhadap Kerajaan Negeri telah diterbitkan di dalam akhbar Sin Chew Daily News, risalah-risalah DAP dalam bahasa Cina dan Inggeris dan portal berita, Malaysiakini. Sebelum perbicaraan tindakan, responden telah memfailkan permohonan di bawah A. 14A Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk penentuan soalan-soalan berikut, iaitu, (i) sama ada perayu pertama dan/atau perayu kedua mempunyai hak untuk mengambil tindakan kerugian berdasarkan tuntutan fitnah terhadap responden ('soalan 1'); (ii) sama ada perkataan-perkataan sebenar atau tepat yang didakwa sebagai fitnah dalam risalah DAP dan/atau akhbar Sin Chiew Daily News sepatutnya diplid secara spesifik ataupun dinyatakan dalam kenyataan tuntutan terpinda ('soalan 2'); (iii) sama ada perkataan-perkataan yang diambil daripada artikel Malaysiakini seperti dinyatakan dalam pernyataan tuntutan terpinda mempunyai makna fitnah dan/atau merujuk kepada perayu-perayu dari sudut undang-undang ('soalan 3'); dan (iv) dalam tuntutan libel, sama ada undang-undang membenarkan gabungan beberapa artikel daripada penerbit-penerbit lain dalam pernyataan tuntutan terpinda tanpa mengasingkan maknanya atau imputasi daripada setiap artikel yang menunjukkan seseorang itu telah difitnah ('soalan 4'). Responden menghujahkan bahawa prinsip kes *Derbyshire County Council v. Times Newspapers Ltd* ('*Derbyshire*') terpakai dalam kes ini memandangkan common law terpakai bagi undang-undang fitnah di Malaysia melalui s. 3 Akta Undang-Undang Sivil 1956 tetapi bergantung pada pengubahsuaian di bawah Akta Fitnah 1957. Lanjutan itu, dihujahkan bahawa untuk membenarkan tuntutan perayu-perayu terhadap responden hanya kerana mengkritik mereka kerana salah urus dana awam adalah bertentangan dengan per. 10(1)(a) Perlembagaan Persekutuan yang menjamin kebebasan percakapan dan bersuara. Sebaliknya, perayu-perayu menghujahkan bahawa prinsip *Derbyshire* tidak terpakai di Malaysia memandangkan: (a) prosiding oleh atau terhadap Kerajaan tidak terikat pada common law tetapi dikawal selia oleh statut, iaitu, s. 3 Akta Prosiding Kerajaan 1956 ('GPA'); dan (b) s. 3 GPA tidak mengecualikan prosiding bersifat *libel* atau fitnah oleh atau terhadap Kerajaan. HMT menolak tuntutan perayu-perayu walaupun beliau mendapati bahawa kenyataan-kenyataan tersebut bersifat fitnah dengan alasan bahawa walaupun Kerajaan Negeri atau badan berkanun boleh

mengambil tindakan dan tindakan boleh diambil terhadapnya, hak tersebut tidak dilanjutkan kepada hak mengambil tindakan untuk fitnah. Dalam keadaan ini, HMT menjawab soalan-soalan 2, 3, dan 4 bagi pihak perayu-perayu, kecuali soalan 1. Menyokong keputusan tersebut, HMT bergantung kepada prinsip yang ditetapkan oleh *House of Lords* dalam *Derbyshire* apabila memutuskan, antara lain, bahawa (i) di bawah common law, Pihak Berkuasa Tempatan tidak mempunyai hak untuk menuntut kerugian melalui tindakan fitnah memandangkan ia bertentangan dengan kepentingan awam bagi badan-badan Kerajaan, sama ada pusat atau tempatan, untuk memiliki hak tersebut; dan (ii) bagi kepentingan awam, badan kerajaan boleh dikritik dan hak mengambil tindakan fitnah akan menyekat kebebasan bersuara. Tidak berpuas hati, perayu-perayu merayu ke mahkamah ini. Antara isu-isu yang dibangkitkan untuk pertimbangan adalah (i) sama ada s. 3 GPA memberi hak undang-undang kepada Kerajaan untuk mengambil tindakan fitnah atau *libel* sepertimana dibuat oleh rakyat biasa; dan (ii) sama ada prinsip common law dalam *Derbyshire* terpakai dalam kes ini.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)
Oleh Abdul Rahman Sebli HMR (keputusan majoriti):

(1) Keputusan dalam *Derbyshire* adalah berdasarkan common law yang menekankan tentang kepentingan awam dan kebebasan bersuara untuk mengkritik Kerajaan dan bahagiannya. Keputusan itu dibuat terhadap suatu demokrasi yang telah dibangunkan di mana gabungan sosial dan geopolitik berbeza dengan kita. Akta Prosiding Kerajaan 1956, walau bagaimanapun, merupakan statut khas yang digubal oleh Parlimen untuk memberi hak kepada Kerajaan-Kerajaan Persekutuan dan Negeri untuk memulakan prosiding sivil terhadap sesiapa pun. Seksyen 3 memberi Kerajaan hak yang sama seperti seseorang individu persendirian untuk menuntut terhadap individu persendirian lain melalui tindakan sivil. Ini hak berkanun dan bukannya hak di bawah common law.

(2) Terma 'prosiding sivil' dalam s. 3 GPA ditakrifkan dalam s. 2(2) yang bermakna 'dalam mana-mana prosiding yang bersifat sivil di mahkamah' dan perkataan operatif di dalam s. 3 adalah 'yang akan, jika tuntutan sebegitu wujud antara subjek dan subjek, membolehkan prosiding sivil'. Ini bermakna jika sesuatu tuntutan boleh diambil melalui prosiding sivil antara individu-individu persendirian, maka ia membenarkan prosiding sivil antara Kerajaan dan individu persendirian. Perkataan 'whatsoever' dalam erti kata s. 2(2) merupakan perkataan luas dan berdasarkan perkataan 'whatever'. Tiada apa-apa pun dalam GPA, terutamanya s. 3 yang boleh ditafsirkan untuk menghalang Kerajaan daripada mengambil tindakan fitnah. Apa-apa yang dinyatakan tentang Kerajaan yang mempunyai kemungkinan untuk merendahkan reputasinya di khalayak orang awam yang berfikiran waras, atau untuk menyebabkan kebencian, penghinaan atau ejekan, akan membangkitkan kausa tindakan untuk fitnah. Ujian ini sama terpakai untuk suatu tuntutan fitnah antara individu-individu persendirian.

(3) Serangan fitnah terhadap Kerajaan, terutamanya oleh ahli politik daripada pihak pembangkang dilihat sebagai serangan terhadap parti politik atau pihak Kerajaan. Ini terpakai secara luas kepada mana-mana entiti politik yang membentuk Kerajaan dan kepada sesiapa yang memfitnahnya. Tambahan lagi, untuk membenarkan kebebasan tanpa had untuk memfitnah Kerajaan (bertentangan dengan perlindungan bersyarat atau kritik) dengan menggunakan alasan kebebasan bersuara adalah membenarkan perkara-perkara yang tidak berundang-undang untuk mengatasinya. Membuat kenyataan-kenyataan fitnah yang tidak dikawal terhadap Kerajaan dengan menggunakan kebebasan bercakap dan bersuara sebagai alasan merupakan kaedah politik berbahaya yang boleh membangkitkan reaksi politik negatif dan ganas yang membolehkan kehilangan kawalan.

(4) Responden tidak diberi hak memfitnah Kerajaan sewenang-wenangnya hanya kerana beliau merupakan wakil yang dilantik oleh rakyat. Perbezaan perlu dibuat antara kritikan yang dibuat secara suci hati dan untuk kebaikan rakyat dengan suatu kenyataan yang dibuat secara melulu dengan niat mencapai kepentingan politik dengan menghasut kebencian terhadap Kerajaan. Tambahan lagi, hak berkanun Kerajaan Negeri untuk mengambil tindakan bagi fitnah adalah bebas daripada hak pihak mentadbir, termasuk Ketua Menteri untuk mengambil tindakan atas nama beliau dan kapasiti peribadinya.

(5) Apabila suatu peruntukan dibuat melalui statut, penerimaan common law selepas tarikh-tarikh yang dinyatakan dalam perenggan-perenggan (a), (b) dan (c) sub-s. 3(1) Akta Undang-Undang Sivil 1956 adalah tertutup. Selepas tarikh-tarikh ini, perkembangan common law di Malaysia adalah di tangan mahkamah negara ini. Tambahan lagi, tiada peruntukan dalam UK Crown Proceedings Act 1947 yang *pari materia* dengan s. 3 GPA. Pemakaian common law seperti dalam kes *Derbyshire* adalah tidak betul tanpa mengambil kira peruntukan statutori yang boleh diguna pakai, dalam kes ini s. 3 GPA. Prinsip *Derbyshire* mesti dipertimbangkan dari sudut ini (*Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor*; dirujuk).

(6) Hak berkanun yang diberi oleh s. 3 GPA untuk mengambil tindakan fitnah tidak boleh diambil melalui pemakaian prinsip common law dalam *Derbyshire* atau untuk perkara ini, mana-mana common law dalam bidang kuasa common law yang lain. Tambahan dan dalam apa jua keadaan, s. 3(1) Akta Undang-Undang Sivil 1956 mengecualikan penggunaan common law England di mana 'peruntukan lain dibuat atau akan dibuat selepas ini melalui mana-mana undang-undang bertulis yang berkuat kuasa di Malaysia'. Seksyen 3 GPA merupakan salah satu 'peruntukan lain' yang tidak mengecualikan Kerajaan daripada mengambil tindakan untuk fitnah. Common law tidak boleh mengatasi peruntukan berkanun ini.

(7) Sewajarnya, common law yang dipakai untuk tindakan fitnah oleh Kerajaan atau badan kerajaan tidak terpakai di Sarawak kerana wujudnya s. 3(1)(c) Akta Undang-Undang Sivil 1956 dan s. 3 GPA, yang memberi Kerajaan Negeri hak yang sama seperti rakyat biasa untuk mengambil tindakan terhadap individu lain bagi fitnah melalui tindakan sivil. Dalam apa jua keadaan, isu sama ada kenyataan tersebut memfitnah atau sebaliknya tidak perlu ditentukan memandangkan HMT telah memutuskan bahawa kenyataan tersebut memfitnah perayu-perayu dan responden telah menerimanya tanpa memfailkan apa-apa rayuan terhadap keputusan tersebut.

(8) Kes ini tidak sesuai dikembalikan ke Mahkamah Tinggi untuk perbicaraan memandangkan ia akan menjejaskan segala kehendak prosedur A. 14A, yang bertujuan untuk menjimatkan perbelanjaan dan kelewatan yang akan berlaku jika tindakan tersebut diadakan melalui perbicaraan penuh. Apabila HMT menolak tuntutan perayu-perayu secara keseluruhannya selepas menentukan soalan 1 yang berpihak kepada responden dan soalan-soalan 2, 3 dan 4 berpihak kepada perayu, Yang Arif telah menentukan kes tersebut di bawah A. 14A k. 1(2) KKM. Jika soalan 1 dijawab berpihak kepada perayu, bersama-sama dengan soalan-soalan 2, 3, dan 4, penghakiman akhir sepatutnya dibuat terhadap responden. Memandangkan suatu keputusan di bawah A. 14A adalah keputusan muktamad di mana hak pihak-pihak telah ditentukan dan oleh itu, boleh dirayu ke mahkamah ini dan mungkin ke Mahkamah Persekutuan dengan kebenaran, sebarang rayuan lanjut selepas diputuskan di bawah A. 14A hanya akan melambatkan pelupusan kes ini.

(9) Seseorang litigan yang membuat permohonan ke mahkamah di bawah A. 14A KKM tidak boleh membangkitkan persoalan atas perasaan ingin tahu hanya untuk mendapatkan pandangan mahkamah mengenai sesuatu perkara undang-undang yang dikemukakan untuk penentuan. Ini merupakan suatu penyalahgunaan proses. Apabila persoalan dikemukakan dan ditentukan oleh mahkamah, beliau terikat dengan keputusan tersebut sama seperti pihak berlawanan terikat dengan keputusan tersebut, sama ada keseluruhan tuntutan ditolak atau keputusan muktamad diberikan. Perkara tersebut mesti berakhir di sana. Memandangkan keempat-empat soalan dijawab bagi pihak perayu, tuntutan terhadap responden telah dibuktikan tanpa sebarang kehendak untuk mendengar keterangan daripada responden atau penghujahan lanjut yang perlu dikemukakan di hadapan HMT. Dalam keadaan ini, penghakiman dimasukkan terhadap responden untuk permohonan (1) dan (2) pernyataan tuntutan terpinda dan kerugian untuk dinilai oleh Timbalan Pendaftar Mahkamah Tinggi.

Oleh David Wong Dak Wah HMR (menentang):

(1) Seksyen 3 GPA merupakan perundangan am yang melindungi Kerajaan dengan status perundangan untuk mengambil tindakan atau tindakan diambil terhadapnya, dan tidak lebih atau kurang daripada itu. Ia hanya memberi hak berkanun kepada Kerajaan untuk mencabar apa-apa tindakan undang-undang dalam mana-mana prosiding sivil yang sedia ada kepada rakyat di negara ini. Walau bagaimanapun, ia tidak menjawab persoalan sama ada Kerajaan mempunyai kausa tindakan untuk fitnah. Jawapan tersebut hanya boleh ditemui dalam undang-undang fitnah yang bebas daripada s. 3 GPA.

(2) Seksyen 3(1)(c) Akta Undang-Undang Sivil 1956 tidak menghalang mahkamah untuk membangunkan common law di negara ini jika dan bila diperlukan. Untuk memastikan per. 10 Perlembagaan Persekutuan diberi kepentingannya sendiri, pendekatan adil perlu diambil dan dimulakan atas premis bahawa hak perlembagaan rakyat mesti dilindungi dengan ketat berdasarkan fakta bahawa ia bersifat asas dan penting. Hak ini juga tertakluk pada anggapan di bawah undang-undang bahawa Parlimen tidak akan masuk campur selagi terdapatnya perkataan-perkataan jelas dinyatakan di dalam Akta Parlimen. Tidak terdapat sebarang peruntukan spesifik di dalam Akta Parlimen yang membenarkan Kerajaan memulakan tindakan fitnah untuk menyekat hak kebebasan bersuara di negara ini. Ketiadaan peruntukan sebegitu tidak boleh dipandang rendah.

(3) Tiada sebab kenapa mahkamah ini tidak boleh mengikut prinsip kes *Derbyshire* di dalam undang-undang fitnah kita memandangkan ia selaras bukan sahaja dengan per. 10 Perlembagaan Persekutuan malah dengan pencapaian suatu demokrasi moden. Pencapaian tersebut, antara lain, berhubung dengan kehendak akauntabiliti, ketelusan, kebebasan bersuara dan penerbitan yang bertanggungjawab. Kerajaan akan terus memiliki hak mengambil tindakan fitnah jenayah terhadap sesiapa yang menggunakan perkataan-perkataan fitnah. Memandangkan kerajaan adalah badan awam, maka, berpatutan jika prosiding jenayah melalui Jabatan Peguam Negara diambil untuk melawan perkataan-perkataan fitnah berniat jahat yang digunakan terhadap Kerajaan.

(4) Kedua-dua perayu merupakan badan yang telah dilantik. Kerajaan hari ini terdiri daripada pihak politik yang menang dan reputasi mereka berubah berdasarkan pelbagai alasan. Tidak boleh dipertikaikan bahawa Kerajaan hari ini mungkin popular disebabkan pelaksanaan sesuatu polisi di mana sebarang perkataan fitnah boleh mencemar reputasi atau popularitinya. Dalam apa jua keadaan, Kerajaan boleh membantah apa-apa yang dikatakan terhadapnya melalui domain awam. Dalam kes ini, hakim tidak perlu memutuskan tiga isu lain yang dikemukakan apabila keputusan telah dibuat bahawa perayu-perayu tidak mempunyai *locus* untuk memulakan tindakan fitnah.

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1966] 1 LNS 5 FC ***(not foll)***
Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals [2004] 2 CLJ 553 FC ***(refd)***
Bognor Regis UDC v. Campion [1972] 2 QB 169 ***(refd)***
Bropho v. Western Australia (1990) 171 CLR 1 ***(refd)***
Chee Siok Chin and Others v. Minister for Home Affairs and Another [2006] 1 SLR 582 ***(refd)***
Chew Peng Cheng v. Anthony Teo Tiao Gin [2008] 8 CLJ 418 HC ***(not foll)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
City of Chicago v. Tribune Co 139NE 86 (1923) ***(refd)***
Coleman v. Power (2004) 220 CLR 1 ***(refd)***
Dato' Seri Diraja Hj Adnan Hj Yaakob v. Utusan Melayu [2015] 7 CLJ 960 HC ***(refd)***
Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat [2011] 1 LNS 1441 HC ***(refd)***
Derbyshire County Council v. Times Newspapers Ltd [1992] 3 All ER 65 ***(refd)***
Derbyshire County Council v. Times Newspapers Ltd and Others [1993] 1 All ER 1011 ***(not foll)***
Halton Hills (Town) v. Kirouac [2006] OJ No. 1473 ***(refd)***
Jameel & Anor v. Wall Street Journal, Europe SPRL [2006] 4 All ER 1279 ***(refd)***
Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors [2013] 1 CLJ 107 HC ***(refd)***
Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors (No. 2) [2013] 1 CLJ 124 HC ***(refd)***
Lee Hsien Loong v. Singapore Democratic Party and Others and Another Suit [2006] SGHC 220 ***(refd)***
Lee Kuan Yew v. Jeyaretnam Joshua Benjamin [1990] 1 LNS 78 HC ***(refd)***
Lembaga Kemajuan Tanah Persekutuan & Anor v. Dr Tan Kee Kwong (W-01(NCVC)-551-10-2011) (Unreported) ***(dist)***
Lim Guan Eng v. Utusan Melayu (M) Bhd [2012] 2 CLJ 619 HC ***(refd)***
Reynolds v. Times Newspapers Ltd & Ors [2001] 2 AC 127 ***(refd)***
Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd [2013] 1 LNS 1433 CA ***(dist)***

Legislation referred to:

Civil Law Act 1956, s. 3(1)(a), (b), (c)
Contracts Act 1950, s. 24
Defamation Act 1957, s. 5
Federal Constitution, art. 10(1)(a), (2)(a)
Government Proceedings Act 1956, ss. 2(2), 3, 7(1), (3), 22(1)
Interpretation Ordinance 2005 (Sarawak) (Cap 61), s. 3
Land Development Act 1956, s. 15(1)
Penal Code, s. 499
Printing Presses and Publications Act 1984, s. 7(1)
Rules of Court 2012, O. 14A r. 1(2), O. 18 r. 19(1)(b), (c), (d), O. 92 r. 4
Sarawak Constitution (Amendment) Ordinance 1997 (Sarawak) (Cap A47), arts. 5, 6(3)
Specific Relief Act 1950, ss. 44, 45, 46, 47, 48, 49

Racial Discrimination Act 1975 [Aus], s. 18C

Other source(s) referred to:

Butterworths Common Law Series by Duncan and Neill on Defamation, 4th edn, para 10.07

Carter-Ruck on Libel and Privacy, 6th edn, para 8.13

Halsbury's Laws of England, vol 12(1), 5th edn, para 1239

Malaysian Court Practice 2007 Desk Edition, p 140

For the appellants - JC Fong (Talat Mahmood Abdul Rashid, Mohd Adzrul Adzlan & Azreen Fasya Mohamad Abu with him); AG's Chambers, Sarawak

For the respondent - Chong Siew Chiang (Carol Lua with him); M/s Chong Brothers Advocs

[Editor's note: For the High Court case, please see Government of State of Sarawak & Anor v. Chong Chieng Jen [2014] 1 LNS 702 (overruled in part).]

Reported by Kumitha Abd Majid

JUDGMENT

David Wong Dak Wah JCA (dissenting):

Introduction

[1] I have read the draft grounds of my learned brother, Justice Abdul Rahman bin Sebli with whom my learned brother Justice Zamani bin A Rahim agrees. However, with regret and greatest respect, I am unable to concur with them on the outcome of this appeal. Hence the grounds herein are my views and reasons as to what I think should be the outcome of this appeal.

[2] This is an appeal by the appellants/plaintiffs against the ruling of the Kuching High Court where the learned judge dismissed the appellants' claim for defamation against the respondent premised on the ground that the appellants do not in law have a cause of action in defamation.

[3] We heard the appeal on 9 December 2015 and reserved judgment to consider the submissions of respective counsel. Having done that, I now give my decision and grounds.

Background Facts

[4] The respondent is a Member of Parliament and the Sarawak State Assembly. He is also the then Vice-Chairman of the Democratic Action Party (DAP). The genesis of this suit is the alleged utterances of libellous statements against the appellants relating to the allocation and spending of over RM11 billions of public money. These utterances were published in the Sin Chew Daily News on 3 January 2013, the DAP's leaflet in both Chinese and English and in a portal, Malaysiakini on 18 February 2013.

[5] Prior to the start of the trial of the suit, the respondent took out an application under O. 14A of the Rules of Court 2012 for four questions to be adjudicated upon and they were as follows:

(1) Whether the abovenamed first plaintiff (first appellant), being the State Government of Sarawak, and/or the second plaintiff (second appellant), being a Government Department and an organ of the Government have the right to sue and to maintain an action for damages for defamation against the defendant?

(2) Whether the actual or precise words complained of and alleged to be defamatory of the plaintiffs and/or the actual original words alleged to be defamatory of the plaintiffs in the alleged DAP leaflet (which were written in both Chinese and English languages) and/or in Sin Chew Daily News dated 3 January 2013 (which were written in Chinese language) must be specially pleaded or set out in the amended statement of claim?

(3) Whether the words complained of and set out in para. 6 of the amended statement of claim derived from the alleged article in Malaysiakini dated 18 February 2013, are capable of bearing any defamatory meaning, and/or capable of being understood to refer to the first and second plaintiffs as a matter of law?

(4) In an action for libel, whether it is permissible in law to group together several articles from different publications in the amended statement of claim, without spelling out separately and distinctly what is the precise and pleaded defamatory meaning(s) or imputation(s) that each article is capable of conveying against the person defamed?

[6] Out of the four questions, the learned High Court Judge answered in favour of the appellants except for question (1). No appeal was made by the respondent for questions answered in favour of the appellants. That being the case, the only issue which needs our deliberation is the capacity of the appellants to launch a defamatory suit against the respondent.

High Court Decision

[7] It would not be wrong for me to say that the learned judge in coming to her decision had adopted the approach of the House of Lord's decision in *Derbyshire County Council v. Times Newspapers Ltd and Others* [1993] 1 All ER 1011 (*Derbyshire*) which was applied by the learned judge in *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107 (*Kerajaan Negeri Terengganu*).

[8] The learned judge had also rejected the contention of learned counsel for the appellants that both the appellants are not elected bodies and hence the *Derbyshire* case cannot apply to the case here. In respect of the first appellant, he had submitted that under art. 5 of the State Constitution the executive authority is vested in the Yang di-Pertua Negeri who acts on the advice of Majlis Mesyuarat Kerajaan Negeri and art. 6(3) of the Constitution further provides that members of the said Majlis are the Chief Minister appointed by the Yang di-Pertua Negeri and not more than ten but not less

than four other members of the Dewan Undangan Negeri appointed by the Chief Minister. Relying on the case of *Basnol Abol & Ors v. The State Government of Sarawak & Other Appeals* [2004] 2 CLJ 553 at p. 569, where it was held that the Government of Sarawak is a separate legal entity from the Majlis Mesyuarat Kerajaan Negeri, learned counsel for the appellants had submitted that the State Government, as an institution is not an elected body. As for the second appellant, learned counsel for the appellants submitted that it is only a Government Department.

My Grounds Of Decision

Elected Bodies

[9] On this matter, with respect to learned counsel for the appellants, I agree with the learned judge who had opined that the first appellant can only exist through the electoral process held every five years as provided in the Federal Constitution and as such the second appellant is only but a proxy of the first appellant. What the learned judge said is simply stating the plain and obvious. To say otherwise is simply denying also the plain and obvious. Accordingly, I find that both the first and second appellants are elected bodies and it is in that context that my grounds are premised on.

Derbyshire Principle

[10] It cannot be denied that judging from the manner the submissions are fashioned by the respective learned counsel and the grounds of the learned judge, the rationale in *Derbyshire* is the focal point of this appeal. That being the case, I find it necessary to discuss what the Court of Appeal and Law Lords had expounded in their respective grounds.

[11] The facts there were these. The plaintiff there was the local council which is a democratically elected Government body and had taken an action for defamation against the publishers of a Sunday newspaper, its editor and two journalists (the defendants therein). The defamatory articles related to the plaintiff's investment and control of its superannuation fund. The defendants took an application to strike out the action on the ground that the plaintiff, being a non-trading statutory corporation cannot maintain an action for libel which reflects its administrative reputation when no actual financial loss was pleaded.

[12] The application to strike out failed at the court of first instance but on appeal to the Court of Appeal, the aforesaid application to strike out succeeded and this is how the Court of Appeal (see *Derbyshire County Council v. Times Newspapers Ltd* [1992] 3 All ER 65) put it:

> Although in general a trading or non-trading corporation which could show that it had a corporate reputation (as distinct from that of its members) which was capable of being damaged by a defamatory statement could sue in libel to protect that reputation in the same way as could a natural person, a local authority had no right to sue for libel

> in respect of its governing or administrative reputation if no actual financial loss was pleaded or alleged. If a non-trading public authority were to have that right it would be able to stifle legitimate public criticism of its activities and thereby interfere with the right to freedom of expression enshrined in art. 10a of the Convention for the Protection of Human Rights and Fundamental Freedoms, and a right to sue for libel was unnecessary in a democratic society for the protection of a public authority's reputation since that could adequately be protected by bringing an action for malicious falsehood or by a prosecution for criminal libel. It followed that the plaintiff local authority could not maintain an action for a libel which reflected upon it as a local authority in relation to its governmental and administrative functions, including its statutory responsibility for the investment and control of its superannuation fund. The appeal would therefore be allowed.

[13] The House of Lords on appeal affirmed the decision of the Court of Appeal and in doing so saw it fit not to rely on art. 10a of the Convention for the Protection of Human Rights and Fundamental Freedoms but relied on common law to pronounce that an organ of local Government cannot maintain an action for defamation. The rationale of the House of Lords can be discerned from the following paragraph of Lord Keith's opinion:

> There are, however, features of a local authority which may be regarded as distinguishing it from other types of corporation, whether trading or non-trading. The most important of these features is that it is a governmental body. Further, it is a democratically elected body, the electoral process nowadays being conducted almost exclusively on party political lines. It is of the highest public importance that a democratically elected governmental body, or indeed any governmental body, should be open to uninhibited public criticism. The threat of a civil action for defamation must inevitably have an inhibiting effect on freedom of speech.

Appellants' Contention

[14] The submission of learned counsel for the appellants before us, in substance, is premised on s. 3 of the Government Proceedings Act 1956 (GPA) which reads as follows:

> Subject to this Act and of any written law where the Government has claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.

[15] According to learned counsel for the appellants, s. 3 of the GPA has conferred a legal right to a Government to sue in defamation or libel as such claims can be made between private citizens. This right to sue, it is further submitted, is statutory in nature as it is a right conferred by an Act of Parliament and cannot be supplanted by the application of common law

principles. Premised on that, he submitted that the learned judge had erred when she applied the *Derbyshire* principle to conclude that the appellants could not maintain an action for defamation.

[16] Learned counsel for the appellants further submitted that, in any event, the common law of England cannot be applied by virtue of s. 3(1) of the Civil Law Act 1956 as there is already a written law in the form of s. 3 of the GPA.

[17] With respect to learned counsel for the appellants, I disagree with his contention and my reasons are as follows. His analysis of s. 3 of the GPA is in fact, so to speak, asking half a question and getting half an answer. Why do I say that? In my view s. 3 of the GPA is a general piece of legislation to cloth the Government the legal status to sue or be sued, nothing more or nothing less. It only gives the Government the statutory right to mount any legal action in any civil proceedings which are available to and among private citizens of the country. However, that does not answer the second half of the question and that is whether the Government possess a "cause of action" in an action for defamation. Only by asking the second half of the question and getting an answer will there be a complete question and answer. And with respect to learned counsel for the appellants, that answer can only be found in the law of defamation independent of s. 3 of the GPA which I now move to.

[18] The issue here is simply whether the *Derbyshire* principle is applicable in our law of defamation. Before I answer that, I wish to state the reliance of s. 3 of the Civil Law Act by learned counsel for the appellants to support his contention is misplaced and my reasons are these.

[19] Section 3 of the Civil Law Act 1956 provides as follows:

> 3(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia the Court shall-
>
> (a) -
>
> (b) -
>
> (c) In Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on the 12th day of December, 1949, subject however to subsection 3(ii) -

[20] Premised on s. 3 of the Civil Law Act, learned counsel for appellants submitted that since the *Derbyshire* principle came into existence only in 1993, which is well beyond 1949 as provided in the Civil Law Act, our courts are prohibited from applying the English common law. My answer to that is simply the development of common law in Malaysia rests squarely in our hands and the courts are duty bound to develop the same to suit the times that we live in. It may well be that we adopt the English common law but once adopted it becomes our common law. Hence s. 3(1)(c) of the Civil

Law Act is no impediment to our courts if and when they deem it fit to develop our common law. With that I move back to the pivotal issue mentioned earlier.

[21] In Malaysia, we have what we call a constitutional democracy where the Constitution reigns supreme as opposed to a Parliamentary democracy where Parliament reigns supreme. In our Constitution, the citizens of the country are given certain basic rights, one of which is freedom of speech which is found in art. 10 of the Constitution which reads as follows:

> Freedom of speech, assembly and association
>
> 10.(1) Subject to clauses (2), (3) and (4):
>
> (a) every citizen has the right to freedom of speech and expression;
>
> (b) all citizens have the right to assemble peaceably and without arms;
>
> (c) all citizens have the right to form associations.
>
> (2) Parliament may by law impose:
>
> (a) on the rights conferred by paragraph (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;
>
> (b) on the right conferred by paragraph (b) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;
>
> (c) on the right conferred by paragraph (c) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

[22] One can easily see from art. 10 that freedom of speech is not absolute and rightly so in any modern democracy. It empowers the Government of the day to limit that freedom for the common good of the country.

[23] To ensure that art. 10 of the Federal Constitution is given its due importance, a common sense approach must be adopted and that is simply to start on a premise that constitutional rights of citizens must be jealously guarded in view of the fact that they are basic and fundamental in nature. These rights are also subject to a presumption in law that Parliament will not invade the same unless clear words are employed in Acts of Parliament. This approach reflects the views of the apex court of Australia where Justices Gummow and Hayne in *Coleman v. Power* (2004) 220 CLR 1 had stressed that, "for the fundamental common law right of freedom of expression to be eroded, clear words are required". (see also *Bropho v. Western Australia* (1990) 171 CLR 1 at 17-18).

[24] Examples of such clear words can be seen in this country in the Sedition Act 1948 and Printing Presses and Publications Act 1984. An illustration of such limitation is s. 7(1) of the Printing Presses and Publications Act 1984 which says:

> 7(1) If the Minister is satisfied that any publication contains any article, caricature, photograph, report, notes, writing, sound, music, statement or any other thing which is in any manner prejudicial to or likely to be prejudicial to public order, morality, security, or which is likely to alarm public opinion, or which is or is likely to be contrary to any law or is otherwise prejudicial to or is likely to be prejudicial to public interest or national interest, he may in his absolute discretion by order published in the *Gazette* prohibit, either absolutely or subject to such conditions as may be prescribed, the printing, importation, production, reproduction, publishing, sale, issue, circulation, distribution or possession of that publication and future publications of the publisher concerned.

[25] Such restrictions, of course, are not foreign in other jurisdictions. In Australia they have the Racial Discrimination Act 1975 (Cth) where in s. 18C, it makes it unlawful for a person to do an act, other than in private if the act is reasonably likely, in all the circumstances, to "offend, insult, humiliate or intimidate" another person and the act is done because of the race or national origin of that person.

[26] Another legislation of significance is s. 499 of the Penal Code which says as follows:

> Whoever, by words either spoken or intended to be read or by signs, or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm the reputation and shall also be liable to fine of such person, is said, except in the cases hereinafter excepted, to defame that person.

This provision is what we refer to as criminal defamation.

[27] We also have the Defamation Act 1957. However, nowhere in any Act of Parliament is there a specific provision allowing the Government to maintain an action for defamation to stifle this constitutional right of freedom of speech of citizens of the country. The significance of the absence of such a provision cannot be underestimated. As I have said earlier, there is a presumption that the Government will not invade constitutional rights and when they do, they can only do so by clear words employed in Acts of Parliament.

[28] I also associate myself with the sentiments of Lord Keith in *Derbyshire* when he said that "not only is there no public interest favouring the right of organs of Government, whether central or local, sue for libel, but that it is contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech". I also note that in jurisdictions of United States of America (*City of Chicago v. Tribune Co*

139NE 86 (1923)), Australia and Canada (*Halton Hills (Town) v. Kirouac*, [2006] O.J. No. 1473 (Sup. Ct.), they have adopted the *Derbyshire* principle either in the form of statute or common law.

[29] Hence, I see no reason why we should not adopt the *Derbyshire* principle in our defamation law as it would be consistent not only to art. 10 of the Federal Constitution but to all the hallmarks of a modern democracy. Those hallmarks, among others, relate to the need for accountability, the need for transparency, the need for freedom of expression and the need for a healthy and responsible fourth estate. As pointed out by the Law Lords in the *Derbyshire* case, the Government continues to possess the right to take a criminal defamation action against whoever uttered defamatory words. As the Government is a public body, it is only appropriate that criminal proceedings through the Attorney General Chambers are used to combat malicious defamatory utterances against the Government of the day.

[30] For completeness, I now look at the cases cited by counsel and they are as follows:

(i) *Lembaga Kemajuan Tanah Persekutuan & Anor v. Dr Tan Kee Kwong* (Court of Appeal - W-01(NCVC)-551-10-2011) (Unreported) (*Lembaga Kemajuan*).

(ii) *Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd* [2013] 1 LNS 1433 (*Tony Pua*).

(iii) *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107 (*Kerajaan Negeri Terengganu*).

(iv) *Dato' Seri Diraja Hj Adnan Hj Yaakob v. Utusan Melayu* [2015] 7 CLJ 960.

[31] Learned counsel for the appellants referred to *Lembaga Kemajuan* where Linton Albert JCA (as he then was) stated as follows:

> The cross-appeal relates to the respondent's contention that the appellants as public authorities could not sue for defamation. There is no dispute relating to the 1st appellant being a government body, nor the 2nd appellant as wholly owned by the 1st appellant thereby to all intents and purposes, a government body. The respondent relies on *Derbyshire County Council v. Times Newspaper Ltd & Ors* [1992] QBD 770 a decision of the Court of Appeal which was affirmed by the House of Lords. The headnote in that case reads in part as follows:
>
> > The plaintiff, a local authority, brought an action for damages for libel against the defendants in respect of certain newspaper articles which made allegations in relation to share dealings involving the investment of moneys from the local authority's superannuation fund, sometimes by a complex series of deals, in companies connected with or controlled by a businessman.

A Held, allowing the appeal, that, notwithstanding the general principle that a trading or non-trading corporation was entitled to sue in libel to protect so much of its corporate reputation, as distinct from that of its members, as was capable of being damaged by a defamatory statement, a local authority, as a corporate public authority, was not entitled at common law to sue for libel to
B protect its governing reputation; that to allow it to do so would impose a substantial and unjustifiable restriction on freedom of expression.

It is submitted on behalf of the respondent that the principle in *Derbyshire County Council* ought to be applied as it has also been applied in several
C commonwealth jurisdictions. With respect, we do not find any justification for applying the *Derbyshire County Council* principle here. In particular section 15(1) of the Act gives the 1st appellant the right to sue, and to be sued. It would be preposterous for the court to take away a statutory right by applying English common law principles. Even section 3(a) of the Civil Law Act which allows for the application of English
D common law does not contemplate its application beyond that which is administered on 7th day of April, 1956. Finally it is patently clear that the facts in the instant appeal can be distinguished from the facts in the *Derbyshire County Council* case in that here the 1st and 2nd appellants are a statutory body and a company registered under the Companies Act 1965 respectively whereas there the entity in question was a Local Authority.
E They are therefore totally different entities. There was therefore no merit in the cross-appeal.

[32] With respect, the aforesaid case is clearly distinguishable to the present case at hand. The appellants there are, as pointed out by Justice Linton himself, statutory bodies incorporated under the Companies Act
F 1965. In this present case, the appellants are the State Government and its proxy respectively, the existence of both was by virtue of an electoral process. Further the reliance on s. 15(1) of the Land Development Act 1956 (which contains similar wordings as s. 3 of the GPA) is also flawed as pointed out earlier.

G **[33]** As for *Tony Pua* case, learned counsel for the appellant relied on the following part of the judgment of Anantham Kasinather JCA (as he then was):

16. The local authorities recognise the right of private companies involved in the provision of public services to sue in defamation. The reasons advanced by English authorities such as *Derbyshire County Council v. Times*
H *Newspapers Ltd & Ors* [1993] A.C 534 in denying this right to a company performing a similar role to the respondent in the United Kingdom to institute proceedings for defamation, has to date not been accepted by our Courts as representing the law of this country. As we do not consider the impugned words to be defamatory, we do not propose in this judgment
I to interfere with the ruling of the Learned Trial Judge that the respondent enjoyed the necessary *locus* to institute the claim for defamation against the appellant.

Again in this case, the respondent is a statutory body formed under the Companies Act, hence distinguishable to this present case. In any event, there appears to be no detailed deliberation of whether the *Derbyshire* principle should be accepted as the law of the country as it was found there that the impugned words were not defamatory.

[34] It is not disputed that the Local Authority in *Derbyshire* came into existence, like the appellants here, by virtue of an electoral process, a point, in fact the pivotal point reading from the grounds of the learned judge, which was strongly contended by learned counsel for the appellants at the High Court. He had sought to distinguish *Derbyshire*, as pointed out earlier, on the ground that the appellants are not elected bodies and hence not applicable. There appears to be no contention by learned counsel, reading from the grounds of the learned judge, that the *Derbyshire* principle is not part of our law on defamation.

[35] The last case is *Kerajaan Negeri Terengganu* which, in our view, has the same factual matrix as this case. The plaintiffs in that case are the State Government of Terengganu and three others who had sued the defendants for defamation. Prior to the trial of the suit, the court had to deal with the preliminary issue of whether the first plaintiff, being the State Government of Terengganu, can maintain a defamation action in law.

[36] The learned judge after admirably analysing the relevant cases and statute thoroughly concluded that she ought to apply the *Derbyshire* principle and held that the State Government of Terengganu cannot in law maintain an action for defamation. She started her deliberation by determining the significance of s. 3 of the GPA and this was how she approached it:

> [14] Going by s. 3 of the above Act, the government can institute a claim against any person if the claim that has arisen between subject and subject **"afford ground for civil proceedings"**. Unfortunately, the phrase "afford ground for civil proceedings" has not been defined or given any meaning in the same Act.
>
> [15] The question that arises is **whether defamation, in particular libel, as in this case, affords ground to the 1st plaintiff**, being a State Government, to enforce the claim by proceedings taken by or on behalf of the State Government. Guidance on the answer to this question can be found by reference to case law. (emphasis added)

[37] Her Ladyship's approach is similar in substance to my approach and that is simply asking the second half of the question of whether the appellants have a "cause of action" (afford ground for civil proceeding) in the law of defamation. The learned judge then gave her rationale for adopting the *Derbyshire* principle and held that the aforesaid principle is part of the law of defamation of the country. On appeal to this court, her decision was affirmed on 14 January 2013. Though no grounds were given by this court, it can be safely said that this court in *Kerajaan Negeri Terengganu* had accepted that the

A *Derbyshire* principle is part of our law on defamation as the grounds of Her Ladyship was solely anchored on the *Derbyshire* principle. From my research, it appears that there is no pronouncement on the *Derbyshire* principle by the apex court of the country. It is my view that the *Kerajaan Negeri Terengganu* is an apt authority for the application of the *Derbyshire* principle for the B simple reason that it also concerned a State Government as in this present case.

[38] While in the process of writing this judgment, it was brought to my notice that this court had recently dealt with the issue of whether the *Derbyshire* principle applies in our country. That occasion is the appeal C against the decision of the High Court in *Dato' Seri Diraja Hj Adnan Hj Yaakob v. Utusan Melayu* [2015] 7 CLJ 960. The factual matrix as per the headnotes is this. The plaintiff, the elected State Assemblyman for Pelangai and Chief Minister ('Menteri Besar') of the State of Pahang, claimed for defamation against the defendant in respect of a newspaper article in Mingguan Malaysia. D The defendant sought to strike out the plaintiff's writ and statement of claim and re-amended statement of claim (encl. 34) under O. 18 r. 19(1)(b), (c) and/or (d) and O. 92 r. 4 of the Rules of Court 2012 ('ROC'). The issue raised for the court's determination therein was whether the plaintiff had *locus standi* to institute and maintain the action against the defendant. The E defendant submitted that the plaintiff, in his official capacity as the Menteri Besar of Pahang, lacked the *locus* to initiate and maintain the suit on the ground that the plaintiff was an elected representative who can be subjected to public criticism.

[39] The learned judge there dismissed the application to strike out on the F ground that the plaintiff there was not suing in his official capacity as the Menteri Besar or Chief Minister. The learned judge had in fact applied the *Derbyshire* principle and as such she had to determine, as a matter of fact, whether the plaintiff was suing as the Chief Minister and if so, he would be barred from maintaining an action for defamation as the office of the Chief G Minister is a democratic elected office. After perusing the pleadings, the learned judge found as a fact that the plaintiff was suing in his personal capacity and dismissed the application to strike out. On appeal to this court, the High Court's decision was overturned and the case was struck out on the ground that the plaintiff is suing in the capacity as the Chief Minister. Though no grounds are available yet, it can also be safely assumed that the *Derbyshire* H principle was applied otherwise that suit would not have been struck out. Hence we can say that presently there are two appellate court decisions adopting the *Derbyshire* principle as part of the law of defamation in this country. I draw comfort for my view from those two decisions of this court.

I **[40]** Across the causeway in Singapore, the courts there did not appear to have rejected the *Derbyshire* principle. In *Lee Hsien Loong v. Singapore Democratic Party and Others and Another Suit* [2006] SGHC 220, it was argued by the defendant there that whether the plaintiff being the Prime Minister had

the *locus* to sue for defamation was an issue that should be tried. The defendant relied on the *Derbyshire* principle to contend that a Government or Public Authority cannot be defamed, thus cannot sue for defamation. The learned judge rejected the defendant's argument premised on the rationale that the *Derbyshire* principle did not restrict an individual's right to sue for defamation even though that individual holds public office. Her Ladyship quoted with approval the legal principle expounded by VK Rajah J in *Chee Siok Chin and Others v. Minister for Home Affairs and Another* [2006] 1 SLR (R) 582 which states as follows:

> The case [*Derbyshire*], however, makes it clear that the decision itself does not affect the right of an individual member or officer of a government body to sue if the statement about the body is capable of being interpreted as referring to the individual. Indeed, the ability of the individual to sue seems to be regarded as a reason for denying such right to the body: *Gatley on Libel and Slander* [Sweet & Maxwell, 10th Enclosure 2a dismissed, 2004] at para 8.20.

Needless to say the learned judge could have dismissed the point raised by the defendant there by rejecting rather than distinguishing the *Derbyshire* principle.

[41] Further, can one really say that Governments have a reputation *per se*? Governments of the day are made up of the members of the winning political party and their reputation or popularity fluctuates due to numerous and varied reasons. It cannot be disputed that a Government of the day may be so popular due to an implementation of a particular policy that no amount of defamatory utterances could put a dent on its reputation or popularity. How does one measure or determine that reputation? Such is the nebulous nature of the reputation of a Government. In any event, the Government of the day can always rebut whatever that is said of it in the public domain. Lord Keith in *Derbyshire*, in my view, had put this in proper perspective when he said as follows:

> In the case of a local authority temporarily under the control of one political party or another it is difficult to say that the local authority as such has any reputation of its own. Reputation in the eyes of the public is more likely to attach itself to the controlling political party, and with a change in that party the reputation itself will change. A publication attacking the activities of the authority will necessarily be an attack on the body of councillors which represents the controlling party, or on the executives who carry on the day-to-day management of its affairs. If the individual reputation of any of these is wrongly impaired by the publication any of these can himself bring proceeding for defamation. Further, it is open to the controlling body to defend itself by public utterances and in debate in the council chamber.

Applying the above reasoning to the present case, as the alleged defamatory utterances are related to the management of the financial affairs of the State, the most proximate individual, I would imagine, could be the Minister of

Finance of Sarawak in his own personal capacity. But that said and to avoid any doubt, let me say that I am not making any ruling that the aforesaid Minister is the proper person who should be embarking on this suit of defamation against the respondent. That issue is left for another day.

Conclusion

[42] The right of an individual, be it any Government officer or otherwise, to maintain an action for defamation is still preserved and must be regarded as a basic and fundamental constitutional right to defend one's reputation. My views, in no way, invade on that right.

[43] Finally, and for reasons stated above, I find that there is no reason for me to disturb the rationale of the learned judge on the point of *locus* of the appellants. However, I note that it was not necessary for the learned judge to deliberate and decide on the other three issues posed once she had decided that the appellants lacked *locus* to maintain an action for defamation. Accordingly, this appeal is dismissed with costs in the sum of RM10,000.

Abdul Rahman Sebli JCA (majority):

[44] We heard arguments on 9 December 2015 and reserved judgment to a date to be fixed. Having deliberated on the matter, we have come to a split decision. Our learned brother Justice David Wong Dak Wah is in favour of dismissing the appeal whereas my learned brother Justice Zamani A Rahim and I are in favour of allowing the appeal. This then is our majority decision.

[45] This appeal is against the decision of the High Court at Kuching that decided that although the State Government or a statutory body can sue or be sued, that right does not extend to the right to sue for defamation. In the result the State Government and the State Financial Authority's action for defamation against the respondent was dismissed with costs.

[46] The action did not proceed to full trial as it was decided purely on points of law pursuant to an application made by the respondent under O. 14A of the Rules of Court 2012 ("the Rules"). A determination under this Rule binds the parties and no evidence is required to prove the pleaded facts in issue.

[47] There were four questions of law posed for the High Court's determination and they were as follows:

(1) Whether the first appellant (first plaintiff in the court below), being the State Government of Sarawak, and/or the second appellant (second plaintiff in the court below), being a Government Department and an organ of the Government have the right to sue and to maintain an action for damages for defamation against the respondent (defendant in the court below).

(2) Whether the actual or precise words complained of and alleged to be defamatory of the appellants and/or the actual original words alleged to be defamatory of the appellants in the alleged DAP leaflet (which were written in both Chinese and English languages) must be specifically pleaded or set out in the amended statement of claim.

(3) Whether the words complained of and set out in para. 6 of the amended statement of claim derived from the alleged Malaysiakini dated 18 February 2013, are capable of bearing any defamatory meaning, and/or are capable of being understood to refer to the first and second appellants as a matter of law.

(4) In an action for libel, whether it is permissible in law to group together several articles from different publications in the amended statement of claim, without spelling out separately and distinctly what is the precise and pleaded defamatory meaning(s) or imputation(s) that each article is capable of conveying against the person defamed.

[48] We are only concerned with question (1) as the other three questions were answered in favour of the appellants and no appeal or cross-appeal was filed by the respondent against the decision. The respondent is therefore deemed to accept the High Court's determination on those issues of law.

[49] The defamatory statement attributed to the respondent, who is a member of Parliament for Bandar Kuching and the State Assemblyman for Kota Sentosa pertains to the alleged mismanagement of the State's financial affairs, where he alleged that RM11 billion of public fund had disappeared into a "black hole", whatever he meant by that hole but certainly uncomplimentary of the State Government.

[50] The statement was published in two publications, namely the Sin Chew Daily News on 3 January 2013 and in the DAP's leaflet both in Chinese and English and also in an online news portal Malaysiakini on 18 February 2013. The DAP leaflet contains a drawing of the figure "RM11,000,000,000" being sucked into a whirlpool with a black hole at the centre.

[51] Among the statements attributed to the respondent as translated into English in Appendix D was the following:

> Chong said whenever people talked about the lack of facilities, the government always give a lame excuse of not having enough fund but right unknown to us there is this RM11 billion disappearing into the black hole. Chong said this proved a point that the state does not have money because state money going somewhere else and Chong warned the state government that they may be able to get away from the Opposition questioning but they cannot get away from the people as a whole.

[52] In answering question (1) in the negative, the learned judge relied on the principle laid down by the House of Lords in *Derbyshire County Council v. Times Newspapers Ltd* [1993] AC 534; [1993] 1 All ER 1011, which Her Ladyship aptly described as the '*Derbyshire* principle' where it was held, affirming the decision of the Court of Appeal, as follows:

(i) under common law a Local Authority does not have the right to maintain an action for damages for defamation as it would be contrary to the public interest for the organs of Government, whether central or local, to have that right; and

(ii) it was of the highest public importance that a governmental body should be open to uninhibited public criticism, and a right to sue for defamation would place an undesirable fetter on freedom of speech.

[53] The learned judge noted that the *Derbyshire* principle had been applied in Malaysia in two High Court cases, namely *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors* [2013] 1 CLJ 107 and *Kerajaan Negeri Terengganu & Ors v. Dr Syed Azman Syed Ahmad Nawawi & Ors (No. 2)* [2013] 1 CLJ 124. These two cases went up on appeal to this court where the outcome was that the decision in the first case was affirmed whereas the decision in the second was reversed.

[54] Unfortunately we do not have the benefit of the grounds of judgment of either case to enable us to know the actual reasons for the decisions. It is interesting to note though that the two cases involved the same parties and were decided by the same High Court Judge.

[55] It is obvious that the decision of the House of Lords in *Derbyshire County Council* was based on the common law of England, which emphasised on public interest and the freedom of expression to criticise the Government and its organs, in that case the local Government.

[56] The precise scope of the rule is however unclear: see *Butterworths Common Law Series by Duncan and Neill on Defamation* (4th edn) at para. 10.07. What is clear is that the decision was made against the backdrop of a developed democracy whose social fabric and geopolitics are very different from ours.

[57] *Derbyshire County Council* was followed in two other House of Lords decisions, namely *Reynolds v. Times Newspapers Ltd & Ors* [2001] 2 AC 127 and *Jameel & Anor v. Wall Street Journal, Europe SPRL* [2006] 4 All ER 1279. Before the decision in that case, the common law of England allowed a local Government to sue for defamation as demonstrated by the judgment of Browne J in *Bognor Regis UDC v. Campion* [1972] 2 QB 169 where he ruled:

> Just as a trading company has a trading reputation which it is entitled to protect by bringing an action for defamation, so in my view the plaintiffs as a local government has a "governing reputation" which they are equally

entitled to protect in the same way - of course, bearing in mind the vital distinction between defamation of the corporation and defamation of its individual officers or members.

[58] The *Derbyshire County Council* case, decided in 1993 had thus changed the common law of England in this area of the law. Mr Chong Siew Chiang for the respondent submitted that the *Derbyshire* principle can be applied to the present case as the common law of England applies to defamation law in Malaysia by reason of s. 3 of the Civil Law Act 1956 ("the Civil Law Act") but subject to modification by the Defamation Act 1957 (Revised 1983) ("the Defamation Act").

[59] For this proposition he cited the following authorities: *Abdul Rahman Talib v. Seenivasagam & Anor* [1966] 1 LNS 5; [1966] 2 MLJ 66, a Federal Court's decision and *Chew Peng Cheng v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418; [2008] 5 MLJ 577, a decision of the Sibu High Court.

[60] It was strenuously argued that to allow the State Government of Sarawak and the State Financial Authority to maintain an action for damages for defamation against the respondent simply for criticising them for mismanaging public fund, which runs into billions of ringgit will go against art. 10(1)(a) of the Federal Constitution which guarantees freedom of speech and expression.

[61] It was further submitted that to allow the appellants the right to sue the respondent for defamation in all the circumstances of the case is altogether unprecedented and there is no principle of law on which it can be founded.

[62] Datuk JC Fong for the appellants on the other hand argued that the *Derbyshire* principle, based as it is on the common law of England has no application in Malaysia, for the following two reasons:

(a) Proceedings by or against the Government are not bound by common law rules but are regulated by statute, ie, s. 3 of the Government Proceedings Act 1956 ("the Government Proceedings Act");

(b) Section 3 of the Government Proceedings Act does not exclude proceedings in libel or defamation by or against the Government.

[63] Section 3 of the Government Proceedings Act reads as follows:

3. Subject to this Act and of any written law where the Government has a claim against any person which would, if such claim had arisen between subject and subject, afford ground for civil proceedings, the claim may be enforced by proceedings taken by or on behalf of the Government for that purpose in accordance with this Act.

[64] We note that the learned judge in her grounds of judgment did not direct her mind to this provision, which is crucial for the determination of question (1). Her focus was on s. 5 of the Defamation Act 1957, which provides as follows:

A

> 5. In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

B **[65]** Her Ladyship interpreted the word "plaintiff" in the above provision as to mean, by virtue of s. 3 of the Interpretation Ordinance of Sarawak, the male and female gender. It follows, according to the learned judge, that only a human being can sue for defamation and not a Government.

[66] There can be no argument that the Government Proceedings Act is
C a special statute specially promulgated by Parliament to give the Federal and State Governments the right to commence civil proceedings against any person. Section 3 gives the Government the same right as a private individual to enforce a claim against another private individual by way of civil action. It is a statutory right and not a common law right.

D **[67]** The term "civil proceedings" used in s. 3 is defined by s. 2(2) to mean "any proceeding whatsoever of a civil nature before a court" and the operative words in s. 3 are "which would, if such claim had arisen between subject and subject, afford ground for civil proceedings", meaning to say if a claim affords ground for civil proceedings between private individuals, it
E will afford ground for civil proceedings between the Government and private individuals.

[68] Thus, if a claim affords ground for an action in defamation (which is a form of civil action) between private individuals, it will afford ground for an action in defamation between the Government and private individuals.
F That in our view is the proper construction to be given to s. 3 of the Government Proceedings Act and will not in any way result in an absurdity or be in breach of any canon of statutory interpretation.

[69] The rule is that if the law does not prohibit, it allows. There is
G nothing in the Government Proceedings Act, in particular s. 3 that can be construed as to prohibit the Government from proceeding with an action in defamation. Parliament would have said so expressly if it had so intended.

[70] What is expressly prohibited by s. 3 read with s. 2(2) of the Government Proceedings Act is proceedings under Chapter VIII of the
H Specific Relief Act 1950, or such proceedings as would in England be brought on the Crown side of the Queen's Bench Division. Defamation does not fall under either of these two categories of proceedings.

[71] If a claim for defamation were to be singled out as a cause of action that is prohibited by s. 3, then what is there to stop the argument that some
I other causes of civil action by the Government are also prohibited?

[72] For example, there is nothing in the Government Proceedings Act that expressly gives the Government the right to sue for breach of contract, in as much as it does not expressly give the Government the right to sue for defamation. What it does provide is the reverse, ie, that an action shall lie against the Government for breach of contract, negligence or trespass in the execution of works of construction or maintenance undertaken by the Government or any public officer in the exercise of the public duties of the Government: see s. 7(1) and (3). Does this mean that the Government cannot sue for breach of contract, but only the subject can sue the Government? Certainly not.

[73] Nor does the legislative scheme of the provision warrant such interpretation. On the contrary the provision is clearly inclusive as it speaks of "any proceeding whatsoever of a civil nature". We do not think there is any alternative to the argument that a claim for defamation is a proceeding "whatsoever of a civil nature" within the meaning of s. 2(2) of the Government Proceedings Act.

[74] The word "whatsoever" is a word of wide import and is a derivative of the word "whatever", which the *Concise Oxford English Dictionary* (11th Edition-Revised) defines as follows:

> used to emphasise a lack of restriction in referring to anything, no matter what.

[75] In the context of s. 3 of the Government Proceedings Act, it means there is no restriction on the part of the Government to sue for defamation. Having regard to the clear and unambiguous language of s. 3, the real issue in our view is not whether the Government has a right to sue for defamation but whether the Government has a reputation to protect in order to give it a cause of action in defamation.

[76] Mr Chong Siew Chiang submitted that it has none. We respectfully disagree as reputation is not the exclusive right of a natural person or a body corporate to protect. While it is true that the Government cannot be injured in its feelings, its reputation can be injured by a libel.

[77] Thus, anything that is said about the Government that has a tendency to lower its reputation in the estimation of right thinking members of the public, or to expose it to hatred, contempt or ridicule, will give rise to a cause of action in defamation. It is the same test that is applicable in a claim for defamation between private individuals.

[78] We are not suggesting of course that the Government cannot be criticised. It can and that right to criticise must be protected as it is a symbol of a functioning democracy. What cannot be done however is to defame the Government. So when Mr Chong Siew Chiang referred to the impugned statement as a "criticism", we understand him to mean it in the defamatory sense.

[79] In any event, the issue of whether the impugned statement is defamatory or otherwise must be put to rest as the learned judge had determined the statement to be defamatory of the appellants and the respondent accepted it by not filing any appeal against the determination.

[80] The learned judge relied on the Court of Appeal stage of the *Derbyshire County Council* case reported in [1992] 3 All ER 65 to support her reasoning that the Government's reputation is adequately protected by an action for malicious falsehood or by a prosecution for criminal libel.

[81] With due respect to the learned judge, that does not answer the question whether the statutory right given to the Government by s. 3 of the Government Proceedings Act to sue for defamation is thereby abrogated by such protection. In any case, if the Government can institute criminal proceedings for libel to protect its reputation, we see no reason why it cannot institute civil proceedings for the same purpose.

[82] As a matter of fact, criminal prosecution for libel is a far more serious impediment to free speech and expression than a civil action is. A person can be incarcerated for committing a criminal offence whereas the worst that a person can expect if found liable for a civil wrong is to pay damages and costs. It will hurt his pocket but he will not lose his freedom, unless of course he defies the court order and be cited for contempt.

[83] Whether a statement is in law and in fact defamatory of the Government and whether the defendant in such action can avail himself of the defence of fair comment, justification or qualified privilege under the Defamation Act are matters to be decided at the trial, or alternatively by way of determination under O. 14A of the Rules as was done in this case. They are unrelated to the issue of whether the Government has a right to sue for defamation.

[84] The Defamation Act, which Mr Chong Siew Chiang said is to be read together with s. 3 of the Civil Law Act but subject to modification, does not deal with the right of the Government to commence civil proceedings against any person. The statute that deals with that right is the Government Proceedings Act.

[85] It is cliché to say that the right to freedom of speech and expression guaranteed by art. 10(1)(a) of the Federal Constitution is not an absolute and unfettered right. It has to be so for if it were otherwise, all laws that restrict the freedom of speech and expression will be liable to be struck down as being unconstitutional and no such law can be enacted by Parliament.

[86] We are not aware of any such law that has been struck down by the court on such ground. On the contrary all such laws are perfectly valid by reason of art. 10(2)(a) of the Federal Constitution. This Constitutional restriction dispels any notion that the freedom of speech and expression guaranteed by art. 10(1)(a) is absolute and unfettered.

[87] To allow absolute and unfettered freedom to defame the Government (as opposed to fair comment or criticism) all in the name of freedom of speech and expression is to allow lawlessness to prevail. We must not be blind to the reality that behind every Government is a political party or a coalition of political parties, with power politics being the *raison d'etre* for their existence.

[88] A defamatory attack on the Government, especially by members of a rival political party will be taken as an attack on the political party or parties behind the Government. This applies across the board to any political entity that forms the Government of the day and to those who defame it.

[89] This is not to bring politics into the equation but merely to illustrate the point that making unrestrained defamatory statements against the Government using freedom of speech and expression as the mantra is a dangerous political manoeuvring that can trigger a chain of negative and even violent political reactions that can spiral out of control. We must never underestimate the destructive power of words.

[90] When that happens it will not surprise anyone if those responsible for starting the fire will be the first to disclaim responsibility. If power corrupts and absolute power corrupts absolutely, the thirst for power corrupts and corrupts absolutely in its own way.

[91] Being an elected representative of the people does not give the respondent the right to defame the Government with impunity. A line has to be drawn between criticism that is made in good faith and for the greater good of the people and a statement that is unfounded and made recklessly with the sole intention of gaining political mileage by inciting hatred towards the Government. Outside of Parliament or State Assembly in session, no Member of Parliament or State Assemblyman is immune from defamation action.

[92] The Government has no better right to protect its reputation than the respondent is to protect his reputation as a Member of Parliament, State Assemblyman and as a private citizen from defamatory attack by the Government, who too can be sued for defamation: see *Carter-Ruck on Libel and Privacy* (6th edn) at para. 8.13.

[93] We must point out however that the learned authors of this publication also subscribe to the common law principle that the Government has no *locus standi* or right to maintain an action for defamation.

[94] To the question "Is it in the public interest to allow the Government to sue for defamation?", our answer is simply this. If the law allows it, then it cannot be against the public interest. Parliament, as is often said, does not legislate in vain. It must have had the public interest in mind when enacting s. 3 of the Government Proceedings Act by not excluding defamation from its ambit.

[95] The cases of *Abdul Rahman Talib* and *Chew Peng Cheng* cited by the respondent are not relevant as both are decisions on the defence of fair comment and justification under the Defamation Ordinance 1957 and the Defamation Act respectively. They are not authorities for the proposition that the Government has no right of action in defamation.

[96] It was also Mr Chong Siew Chiang's submission, which found favour with the learned judge, that since the tort of defamation is an action *in personam* and against the private reputation of a natural or juristic person, the proper person to sue as plaintiff is the natural person so defamed.

[97] According to Mr Chong Siew Chiang, if that person is the Chief Minister of Sarawak, then it is the Chief Minister of Sarawak who must sue in his own name and in his personal capacity and not in the name of the State Government. The judgments in *Lim Guan Eng v. Utusan Melayu (M) Bhd* [2012] 2 CLJ 619; [2012] 2 MLJ 394; *Lee Kuan Yew v. Jeyaretnam Joshua Benjamin* [1990] 1 LNS 78; *Datuk Seri Utama Dr Rais Yatim v. Amizudin Ahmat* [2011] 1 LNS 1441 were cited in support.

[98] With due respect, we do not find any merit in the argument. Under s. 22(1) of the Government Proceedings Act, civil proceedings by the Government of a State must be instituted by the State Government. Thus, if the object of the defamatory statement is the State Government, any action that is taken against the defamer must be in the name of the State Government and not in the name of any individual member of the administration.

[99] An example would be where the State Government is wrongly accused of misusing State fund. Here, it is the integrity of the State Government that is being called into question and not the integrity of any individual member of the administration. It is therefore the State Government and not an individual member of the administration that may institute the defamation action.

[100] The statutory right of the State Government to sue for defamation is independent of the right of any member of the administration, including the Chief Minister to sue in his own name and in his personal capacity.

[101] If any of them were to sue in that capacity, it will be an action between private citizens and not between Government and citizen. Such action does not involve the affairs of the State. It is purely a private and personal matter. An example would be where a member of the State administration is wrongly accused of being a thief, and it does not matter if he is accused of stealing Government money or money belonging to a private citizen. It is still a private and personal matter between the accuser and the accused.

[102] The three cases cited by Mr Chong Siew Chiang are of no assistance to the respondent as again they are not authorities on the issue of whether the Government has a right of action in defamation. The members of the administration in those cases chose to sue in their own names and in their personal capacities and it was their right to do so as the defamatory statements were private and personal in nature.

[103] This brings us to the question of the reception of the common law of England in Sarawak, which is regulated by s. 3(1)(c) of the Civil Law Act which reads:

> 3.(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall -
>
> (a) ...
>
> (b) ...
>
> (c) in Sarawak, apply the common law of England and the rules of equity, together with the statutes of general application, as administered or in force in England on 12 December 1949, subject however to subsection (3)(ii) -
>
> Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

[104] Since the *Derbyshire* principle which the learned judge used as the basis for her decision is based on the common law of England, it is important to determine the extent to which the common law of England can be applied in Malaysia.

[105] The authority on point is the then Supreme Court case of *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356 where Hashim Yeop Sani CJ (Malaya) delivering the judgment of the court explained the position as follows at p. 66:

> Section 3 of the Civil Law Act, 1956 directs the Courts to apply the common law of England only in so far as the circumstances permit **and save where no provision has been made by statute law**. The development of the common law after 7 April 1956 (for the States of Malaya) is entirely in the hands of the Courts of this country. **We cannot just accept the development of the common law in England**. See also one of the majority judgments in *Government of Malaysia v. Lim Kit Siang* in [1998] 2 MLJ 12 at p. 40. (emphasis added)

[106] His Lordship then went on to deal with the applicability of the common law of England to illegal contracts under s. 24 of the Contracts Act 1950. This is how the learned CJ (Malaya) dealt with the issue:

A The provision of s. 24 of our Contracts Act is a statutory direction. It may well have originated from some old common law principle but that principle has now been converted into a statutory provision.

We are therefore unable to accept the submission of Mr. Puthucheary that we follow what he termed as the "trend" shown by the Courts in
B common law countries to be slow in striking down illegal contracts because that contention is untenable in the face of statute law of this country.

[107] The position of the law as explained in *Chung Khiaw Bank* is clear, that where a provision has been made by statute, the door to the reception
C of the common law of England after the dates specified in paras. (a), (b) and (c) of sub-s. 3(1) of the Civil Law Act is closed.

[108] After these dates, the development of the common law in Malaysia is "entirely in the hands of the courts of this country" and "We cannot just accept the development of the common law in England". For the State of
D Sarawak, the cut-off date is 12 December 1949.

[109] Mr Chong Siew Chiang relied heavily on the proviso to s. 3(1) of the Civil Law Act to argue that the common law of England applies to defamation law in Malaysia. With due respect, the argument is flawed as it looks at the proviso in isolation without reading it together with the main
E body of sub-s. (1), which sets out cut off dates for the application of "the said common law" of England in Peninsular Malaysia, Sabah and Sarawak.

[110] There was no argument as to what the common law of Sarawak is in relation to an action for defamation by the State Government or by statutory authorities post 12 December 1949. We shall therefore leave the
F question open for determination at some other time on some other occasion.

[111] But whatever may be the common law of Sarawak in this area of the law, we cannot just accept the common law of England as it stood in 1993. We will be doing just that if we just accept the *Derbyshire* principle as the
G applicable law and close both eyes to s. 3 of the Government Proceedings Act.

[112] It may be worth noting that the Government Proceedings Act follows the UK Crown Proceedings Act 1947 ("the Crown Proceedings Act") which altered the general rule at common law that no proceeding, civil or criminal,
H was maintainable against the monarch in person, for it was said that the courts being the King's own, could have no jurisdiction over him. It was based on the maxim "the King can do no wrong".

[113] Under the Crown Proceedings Act, enforcement of orders by or against the crown in civil proceedings are now governed by the same rules
I and in the same circumstances as between subjects: see *Halsbury's Laws of England* vol. 12(1), (5th edn), para. 1239.

[114] There is however, and this is a very important distinction, no provision in the Crown Proceedings Act which is in *pari materia* with s. 3 of the Government Proceedings Act. In fact if we look at the shoulder note and side note to the corresponding provisions in the two Acts of Parliament, the difference in emphasis is obvious.

[115] Whereas the shoulder note to Part II of our Government Proceedings Act under the heading "SUBSTANTIVE LAW" reads: "Right of the Government to sue", the side note to Part I of the UK Crown Proceedings Act under the same heading reads: "Right to sue the Crown".

[116] So the emphasis is at opposite ends of the pole. In view of such fundamental difference in emphasis, which we think cannot be trivialised or ignored, it will be wrong to apply the common law of England as expounded in the *Derbyshire County Council* case randomly without regard to the applicable statutory provision, in this case s. 3 of the Government Proceedings Act. The *Derbyshire* principle must be considered from this perspective.

[117] Within our shores there are at least two decisions of this court that expressed the view that the common law of England does not apply to bar defamation suits by public authorities. The first is *Lembaga Kemajuan Tanah Persekutuan & Anor v. Dr Tan Kee Kwong* (Civil Appeal No.W-01 (NCVC)-551-10-2011)(Unreported) which decided (by majority) as follows:

> It was submitted on behalf of the respondent that the principle in *Derbyshire County Council* ought to be applied as it has been applied in several commonwealth jurisdictions. With respect, we do not find any justification for applying the *Derbyshire County Council* principle here. In particular, section 15(1) of the Act gives the appellant the right to sue and be sued. It would be preposterous for the court to take away a statutory right by the application of English common law principles. Even section 3(1)(a) of the Civil Law Act which allows the application of English common law does not contemplate its application beyond what is administered on 7th day of April, 1956.

[118] The second case is *Tony Pua Kiam Wee lwn. Syarikat Bekalan Air Selangor Sdn Bhd* [2013] 1 LNS 1433 where the following observations were made:

> The local authorities recognise the right of private companies involved in the provision of public services to sue in defamation. The reasons advanced by English authorities such as *Derbyshire County Council v. Times Newspapers Ltd & Ors* [1993] AC 534 in denying this right to a company performing a similar role to the respondent in the United Kingdom to institute proceedings in defamation, has to date not been accepted by our courts as the law of this country. As we do not consider the impugned words to be defamatory, we do not propose in this judgment to interfere with the ruling of the Learned Trial Judge that the respondent enjoyed the necessary *locus* to institute a claim for defamation against the appellant.

[119] It is rather unfortunate that these two cases were not brought to the attention of the learned judge for her consideration. If they had, her answer to question (1) might well have been different. The facts may be distinguishable from the facts of the present case but the important point to note is that in both cases this court refused to apply the *Derbyshire* principle.

[120] Having given anxious consideration to the competing arguments, we are inclined to agree with Datuk JC Fong that the statutory right given to the Government by s. 3 of the Government Proceedings Act to sue for defamation cannot be taken away by the application of the common law principle propounded by the House of Lords in the *Derbyshire County Council* case or, for that matter, any other common law positions in other common law jurisdictions.

[121] Further and in any event, s. 3(1) of the Civil Law Act expressly excludes the application of the common law of England where "other provision has been made or may hereafter be made by any written law in force in Malaysia". Section 3 of the Government Proceedings Act is one such "other provision" which, as we have said, does not prohibit or exclude the Government from suing for defamation. The common law of England cannot override this statutory provision.

[122] Accordingly, we hold that the common law of England as applicable to defamation action by the Government or governmental body has no application in Sarawak by reason of s. 3(1)(c) of the Civil Law Act and by reason of s. 3 of the Government Proceedings Act, which confers on the State Government the same right as a private citizen to sue another private citizen for defamation by way of civil action.

[123] For all the reasons aforesaid, we allow the appeal with no order as to costs. The decision of the High Court dismissing the appellants' claim is set aside. The deposit, if paid, is to be refunded to the appellants.

[124] There remains the question of the consequential effect of our decision, given that question (3) for the High Court's determination was answered in favour of the appellants and no appeal or cross-appeal was filed by the respondent against the determination. For ease of reference, we reproduce below question (3) in its original form:

> (3) Whether the words complained of and set out in paragraph 6 of the Amended statement of claim derived from the alleged Malaysiakini dated 18th February, 2013, are capable of bearing any defamatory meaning, and/ or are capable of being understood to refer to the 1st and 2nd plaintiffs as a matter of law.

[125] By not appealing or cross-appealing against the High Court's decision on this question of law, the respondent must be taken to accept as the truth the court's finding that the impugned statement attributed to him was defamatory of the appellants.

[126] Now that we have answered question (1) in favour of the appellants, the question is whether we should enter judgment against the respondent, or to remit the case back to the High Court for the learned judge to deal with the remaining issues, in particular the pleaded defence of justification, fair comment and qualified privilege, none of which were posed, let alone determined in the O. 14A application.

[127] Having given the matter serious consideration, we do not think it will be proper for us to remit the case back to the High Court for trial as that will defeat the whole purpose behind the O. 14A procedure, which is to save the expense and delay which would otherwise arise if the action were to proceed to full trial: see *Malaysian Court Practice 2007 Desk Edition* at p. 140.

[128] When the learned judge decided to hear the case in accordance with the procedure prescribed by O. 14A, she must have been satisfied that the four questions posed by the respondent were suitable for determination without the full trial of the action and that such determination would finally determine the entire cause of the matter. That would also have been what the respondent had in mind when making the application under O. 14A.

[129] Thus, when the learned judge dismissed the appellants' claim in its entirety after determining question (1) in favour of the respondent and questions (2), (3) and (4) in favour of the appellants, Her Ladyship had in fact finally determined the entire cause of the matter pursuant to O. 14A r. 1(2), exactly as intended by the respondent. Had question (1) been answered in favour of the appellants along with question (2), (3) and (4), final judgment would have been entered against the respondent.

[130] To now allow the case to proceed to trial despite having been finally disposed of under O. 14A is to open the floodgates for such applications to be made piecemeal and by instalment. Technically, it is still open to the respondent to make another such application if we were to remit the case back to the High Court for trial.

[131] Considering that a decision under O. 14A is a final decision in that it finally determines the rights of the parties and therefore appealable to this court and potentially to the Federal Court with leave, any further appeal upon further determination under O. 14A will further delay the final disposal of the case. We do not think we should set a dangerous precedent by allowing trial after a determination under O. 14A.

[132] A litigant who moves the court under O. 14A must not pose the questions out of curiosity just to see what the court's views will be on the points of law that he is posing for determination. That will be an abuse of process. Once the questions are cast in stone and determined by the court, he is bound by the decision in the same way that the opposing party is bound by the decision, either for the entire claim to be dismissed or for final judgment to be entered. The matter must end there.

A **[133]** If a litigant omits to include any question of law that is determinative of the rights of the parties and fails in his application, he cannot turn around and say that the case must nevertheless proceed to trial as the court has yet to decide on the remaining issues of law that he omitted to include in the O. 14A application. He cannot have the best of both worlds and to approbate and reprobate.

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[134] In our view, since all four questions have now been answered in favour of the appellants, the claim against the respondent has been established without any further need to hear evidence from the respondent nor for further arguments to be canvassed before the learned High Court Judge.

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[135] In the circumstances we enter judgment against the respondent in terms of prayers (1) and (2) of the amended statement of claim. Damage is to be assessed by the Deputy Registrar of the High Court.

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